IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.293 OF 2005

Kalyan Dombivli Municipal Corporation,
A Body Corporate, duly constitued
under the provisions of
Bombay Provincial Municipal
Corporation Act,1949,
having its office at
Shakkarrao Chowk, Kalyan,
District Thane,
Through its Commissioner ..Appellant
(Original Defendant)

versus

Tukaram Muttappa Pai,
Adult, Occ: Business,
R/o. J. Building,
Opp. Bhanu Nagar,
Dombivli (E),
District: Thane ..Respondent.
(Original Plaintiff)

Mr.A.s.Rao for the Appellant

Mr.S.P.Kanuga for the Respondent

Coram : S.R.Sathe, J.
Dated : 5th April, 2006

ORAL JUDGMENT

1. Appellant, Kalyan Dombivli Municipal Corporation, the Original Defendant in Regular Civil Suit No.200 of 1992 has preferred this appeal against the judgment and order passed by the Court of Additional District Judge, Kalyan in Civil Appeal No.76 of 1998 whereby the judgment and order passed by the trial court decreeing plaintiff’s suit in his

favour and restraining the defendant Municipal Corporation from demolishing the suit premises or any part thereof without due process of law was confirmed and appeal was dismissed. For the sake of convenience, hereafter the parties shall be referred to as plaintiff and defendant.

2. Brief facts giving rise to this appeal are as under:

. By virtue of two separate agreements dated 8.10.1989 plaintiff purchased two galas (shop premises) bearing Nos.7 and 8 situated on the ground floor of the building known as Milan Guru Co-operative Housing Society, situated at Rajendra Prasad Tilak Nagar, Dombivli (East) and after obtaining the necessary license required for carrying out hotel business, started hotel known as "Hotel Regency" in the said two galas. On 7.2.1992 two persons, possibly officers from defendant Municipal Corporation approached the plaintiff and informed him that the Corporation has received complaint about the hotel premises and as such they would take action against him. When plaintiff enquired, he came to know that one Bhalchandra

Sarportdar and Nayak Kamlakar made complaint in respect of the suit premises. He, therefore, met them and asked them about the complaint and both of them told him that they have not made any such complaint and accordingly they even informed the Corporation in writing. Inspite of the same, on 18.2.1992 in the evening two officers of the defendant Corporation went to plaintiff and threatened him that they would demolish the portion of the suit premises i.e. kitchen portion. As plaintiff has purchased the property from builder, after finding that the necessary permission for construction has been taken by the builder and the plaintiff had not carried out any further alteration or addition in the said structure, plaintiff thought that the action that is likely to be taken by the defendant Corporation is not legal. Apprehending that the defendant would demolish the structure without due process of law, plaintiff filed the present suit on 20.2.1992 for declaration and injunction.

3. On the date of filing of the suit plaintiff also submitted an application for temporary injunction and the learned trial Judge was pleased

to direct both the parties to maintain status quo till further orders. After hearing both the parties the learned trial Judge also granted temporary injunction restraining defendant Corporation from demolishing the suit premises or any part thereof.

4. The defendant Municipal Corporation filed its written statement at Exhibit 27 and contended that the suit is bad for want of notice under Section 487 of the Bombay Provincial Municipal Corporation Act, 1949. (hereafter referred to as the BPMC Act). The defendant further contended that none of their Officer had given any threat to plaintiff as alleged and when their office received complaint about the unauthorised construction carried out by the plaintiff, their officers had been to plaintiff to make enquiry. However, before defendant giving any notice to plaintiff, plaintiff filed the suit and an application for temporary injunction and obtained order regarding status quo. The defendant also contended that the Corporation has right to remove unauthorised construction after giving notice about the same. The defendant also denied plaintiff’s case that no alteration is made in the suit premises. Hence, on all these grounds

defendant prayed for dismissal of the suit.

5. On these pleadings, the learned trial Judge framed issues at Exhibit 30. In order to prove the suit claim the plaintiff examined himself at exhibit 43 and produced certain documents. As against this the defendant Corporation did not adduce any evidence.

6. After considering the evidence led by the plaintiff, the learned trial Judge came to the conclusion that as plaintiff did not produce any documentary evidence to show that the construction of the said premises has been carried out after obtaining necessary permission from the defendant Corporation, the said construction is unauthorised. He also held that the defendant Corporation is trying to demolish the said construction without notice. He, therefore, held that the plaintiff is entitled for declaration and injunction as prayed. Hence, he decreed the suit accordingly.

7. Being aggrieved by the said judgment and order the Defendant Municipal Corporation filed first appeal bearing No.76 of 1998. After hearing

the arguments of both the learned Advocates the learned Additional District Judge came to the conclusion that the decree passed by the trial Court is legal and correct. Naturally, he dismissed the appeal.

8. The above mentioned order of dismissal of the appeal is challenged by the defendant Municipal Corporation in the present Second Appeal.

9. By consent the appeal is heard finally at admission stage.

10. The only substantial question of law involved in this appeal is whether in the facts and circumstances of the case, the Municipal Corporation can demolish the suit premises or any part thereof without notice under Section 260 and/or 478 of the BPMC Act. My answer is in the negative for the following reasons.

11. It is not in dispute that the plaintiff has purchased the property from the builder in the year 1989 under two registered agreements and thereafter he obtained all necessary licenses required for

carrying on business of hotel and then only started the business of hotel in the suit premises. Admittedly, some of these licenses for e.g. License under the Bombay Shop & Establishment Act are even issued by the defendant Municipal Corporation. The learned Advocate for the defendant Municipal Corporation argued before me that in the instant case the trial court has held that the construction in question is unauthorised and having reached to such conclusion it was not proper on his part to hold that Corporation was under an obligation to issue notice under Section 260 and/or 478 of the BPMC Act. Firstly, it is to be mentioned that the plaintiff has categorically stated that when he purchased the property he made inquiry with the builder and got verified that construction is carried out after obtaining necessary permission from the defendant Municipal Corporation. This statement of the plaintiff is not shaken or shattered in the cross examination. What is more to be noted is that the defendant Municipal Corporation has no where specifically stated that the builder had not at all sought any permission for carrying out the construction of the building in question or that though he had sought some permission to carry

out the construction, particular portion of the building is not in accordance with the plan. It is really very strange to find that the defendant Municipal Corporation has deliberately kept mum on this issue. The plaintiff has fairly submitted that he is not holding any map showing that the defendant Municipal Corporation has approved the said map. It must be noted that the defendant Corporation has not examined any witness to show that the construction in question or any part thereof is unauthorised or is against any particular rule. On the contrary they have only made a vague statement in the written statement that Defendant has right to demolish the plaintiff's said unauthorised construction after issuing notice. ("_____

_____

_____)

In my opinion, this statement of defendant Council in the written statement itself is sufficient to pass decree in favour of plaintiff when admittedly such notice is not given by defendant corporation.

12. It must be noted that the plaintiff has come out with a case that he has not carried out any

alteration and addition in the suit premises after he purchased the property. Secondly, he has stated that he has not received any notice from the Corporation regarding demolition of the suit structure or any part thereof. Thirdly, he has alleged that the Officers of the Municipal Corporation only gave him threat of demolishing kitchen of his hotel. It is not even the case of the defendant Municipal Corporation that they have issued any notice to the plaintiff. The above mentioned sentence in the written statement infact clearly indicates that even according to defendant Municipal Corporation this is not a case where unauthorised construction, if any, can be demolished without giving notice.

13. The learned Advocate for the defendant Municipal Corporation strenuously argued before me that though under Section 260 of the BPMC Act it is necessary to issue notice before demolishing, if the construction is unauthorised, then as per Section 478 of the BPMC Act it is not necessary to issue any notice to the occupier or the owner of the unauthorised construction and it can be demolished without even such notice. In order to substantiate

this proposition he has placed reliance on a case **Pune Municipal Corporation vs.Nanasaheb Bhosale AIR 1995 Bom. 164.** It is true that in this authority Honourable Single Judge of this Court has held that there is distinction between Section 260 and 478 of BPMC Act. Section 260 is applied where application for permission to build is made and Section 478 applies where no such application is made and order for demolition under Section 478 can be passed without issuing any show cause notice. However, the facts of the said case and the facts of the case in hand are quite different. In that case whatever additions, alterations were carried out in respect of the compound wall were within the definition of the term building and it was evident that the said erection was unauthorised. However, in the instant case it is not even the case of the defendant Corporation that a particular construction or portion of it is unauthorised or is carried out without their being any application for the same. When the defendant Municipal Corporation themself say that before issuing notice to plaintiff regarding unauthorised construction, he filed the suit, it means that even according to them the construction in question is certainly not falling

within the scope of Section 478 of the BPMC Act. Naturally, the above cited ruling is of no use to defendant Corporation. It is not in dispute that as per the provisions of Section 260 of the BPMC Act it is necessary to issue notice to the occupier/owner before carrying out the demolition activity. Incidently, if we peruse the provisions of Section 478 of BPMC Act, we find that therein also there is some reference regarding the issue of notice. The said section runs as under:

> **"478. Work or thing done without written permission of the Commissioner to be deemed unauthorised.**
>
> (1) If any work or thing requiring the written permission of the Commissioner under any provision of this Act, or any rule, regulation or bye-law is done by any person without obtaining such written permission of if such written permission is subsequently suspended or revoked for any reason by the Commissioner, such work or thing shall be deemed to be unauthorised and, subject to any other provision of this Act, the

Commissioner may at any time, by written notice, required that the same shall be removed, pulled down or undone, as the case may be, by the person so carrying out or doing. If the person carrying out such work or doing such thing is not the owner at the time of such notice then the owner at the time of giving such notice shall be liable for carrying out the requisition of the Commissioner.

(2) If within the period specified in such written notice the requisitions contained therein are not carried out by the person or owner, as the case may be, the Commissioner may remove or alter such work or undo such thing and the expenses thereof shall be paid by such person or owner, as the case may be."

14. So, this Section also in fact does not specifically say that the Corporation can demolish the unauthorised structure without any notice. It is pertinent to note that in the above cited ruling, the Court has observed

> "Order for demolition under Section 478 can be passed without issuing any Show Cause Notice" (emphasis is mine)

So it appears that according to these observations, it is not necessary to call upon the occupant/owner of the unauthorised construction to show cause as to why the structure should not be demolished. But, that does not mean that the occupier/owner should not be given even notice that corporation is demolishing the structure or will be demolishing the structure. Thus, notice under Section 260 is a, show cause notice while notice under Section 478 is notice about demolition. In other words, it is notice about the action decided to be taken by the Corporation. In the instant case, admittedly, the Corporation has not at all given any notice to the plaintiff nor the defendant Corporation has adduced any evidence to show that even in their office they have scrutinised or examined the case and the concerned authority has passed any order regarding demolition. So, under such circumstances, the apprehension of the plaintiff was absolutely reasonable and justifiable and plaintiff was

certainly entitled for declaration that the Corporation should not demolish the structure in question without following due process of law. Both the courts below have rightly issued the declaration and injunction as prayed by the plaintiff. There is no necessity to interfere with the said order.

. In this view of the matter, there is no substance in the appeal. Appeal is dismissed.

(S.R.Sathe, J.)